IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

77-652

LEWIS N. DIXON, PETITIONER

vs

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CITATIONS

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vs

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE NINTH CIRCUIT

The Petitioner LEWIS N. DIXON petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the court of appeals (Appendix A infra) is reported at 558 F.2d 919.

JURISDICTION

The opinion of the court of appeals was entered on July 26, 1977. A timely petition for

rehearing with suggestion for rehearing en banc was denied by order entered October 6, 1977 (Appendix B infra). The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

WHETHER, UNDER UNITED STATES V. CHADWICK, A SEARCH WARRANT SHOULD HAVE BEEN OBTAINED FOR THE OPENING OF A CLOSED BROWN PAPER BAG TO DETERMINE WHETHER IT CONTAINED HEROIN, WHEN THE BAG HAD BEEN SEIZED FROM PETITIONER'S VEHICLE AFTER HIS WARRANTLESS ARREST, AFTER HIS REMOVAL FROM THE AREA, AND AT A TIME WHEN THE BAG HAD BEEN REDUCED TO THE EXCLUSIVE POSSESSION OF FEDERAL AGENTS.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of one count of possession of heroin with intent to distribute [21 USC §841(a)(1)] and of one count of carrying a firearm unlawfully

during the commission of a felony [18 USC §924(c)(2)]. He was sentenced to the maximum term of custody on each count -- fifteen and ten years respectively -- with the sentences to run consecutively for a total of twenty-five years. He is presently serving the sentence.

1. The evidence at trial shows that an informant advised the Drug Enforcement Administration that he was about to negotiate a narcotics transaction with petitioner. The negotiations were taped with the informant's consent. At the agreed time and place of the sale, DEA agents observed petitioner drive up to the informant and stop. A license check confirmed that the car was petitioner's. The informant walked over to the car, knelt down on the passenger side, and had a conversation with petitioner. On a prearranged signal from the informant to indicate that petitioner had heroin in his possession, the agents approached the car and, pointing weapons at petitioner, told him he was under arrest and to get out of the car. Petitioner was told

three times to raise his hands. After hesitating, he finally complied. He was ordered to step out of the car and was taken immediately to the rear of the automobile. One of the agents observed a revolver and a brown paper bag on the floorboard.

Petitioner was searched handcuffed and taken away by agents. Then an agent retrieved the revolver and a closed brown paper bag from the car.[1] The closed bag was opened by the DEA and the heroin was found. The search and seizure occurred after petitioner had been taken to the rear of the car, searched and handcuffed.

There was probable cause for petitioner's arrest. The arrangements for delivery of the heroin were made by petitioner with a government informant who taped the discussions, the plans were known in advance by the DEA, there were a multitude of federal agents and local police present and available when petitioner was

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1/ The record is in conflict whether the closed paper bag was on a seat in the car or on the floorboard. (RT 203; 206-207). See: n. 3, infra.

arrested and the arrest occurred during weekday business hours when local judges, federal judges, and federal magistrates were available. No search warrant was obtained.

2. The court of appeals treated the seizure and opening of the brown paper bag as one incident to a lawful arrest under Chimel v. California, 395 US 752 (1969). United States v. Dixon, 558 F.2d 919, 922.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals is in conflict with this Court's decision in United States v. Chadwick, ___US___, 53 L.Ed.2d 538 (1977). This Court's decision in United States v. Chadwick, applies to movable personalty seized in a public place and requires, absent exigent circumstances, that a search warrant be obtained. The Court's opinion in Chadwick stated:

> "However, warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest.' Preston v. United States, 376 US at 367,

> or if no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident to the arrest."
>
> United States v. Chadwick, ___US___, 53 L.Ed.2d at 550-551 (emphasis added)

The reporter's transcript of record in petitioner's case discloses that petitioner was removed from the vehicle at gunpoint, taken to the vehicle's trunk area, searched and handcuffed. The closed brown paper bag and the gun were then seized from within the vehicle by federal agents. The record reflects that the bag and gun were, in fact, reduced to the exclusive control of the federal agents and that petitioner no longer had any chance of access to them. There is no exigent circumstance excusing the obtaining of the search warrant.

The court of appeals does not consider the impact of Chadwick[2] in relying upon Chimel v. California and particularly does not treat with this Court's observation in Chadwick at n. 10:

> "Unlike searches of the person, United States v. Robinson, 414 US 218 (1973); United States v. Edwards, 415 US 800 (1974), searches of possession within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest."
>
> United States v. Chadwick, ____ US ____, 53 L.Ed.2d at 551, n. 10.

When a warrantless arrest, search and seizure occur, the burden falls upon the government to establish the "lawfulness" of its action. Chadwick, it is respectfully submitted, establishes a per se rule for obtaining a search warrant unless

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2/ Chadwick, decided June 21, 1977, was brought to the attention of the court of appeals by petitioner by letter dated June 27, 1977 (prior to the filing of the decision of the court) and again in the petition for rehearing.

the government meets the burden of demonstrating an exception to the warrant requirement.[3] Since the United States resisted any remand to the district court to develop further facts as to the search and seizure, the government must meet its burden on the facts presently of record. These do support the existence of probable cause for petitioner's arrest and do not support any exception to Chadwick. The

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3/ The petitioner vigorously urged the court of appeals to remand the search and seizure issue to the district court for a hearing to establish the exact facts in connection with the arrest and the seizing of the bag. A written motion to suppress had been filed by petitioner's trial counsel and set for hearing prior to trial. The motion "disappeared" from the docket and was never mentioned again. The facts which exist as to the search and seizure were incidentally introduced at trial when the issues of "possession" of the gun and contrband were being parsed before the jury. The trial transcript is devoid of any mention by petitioner's counsel, the government or the court of a motion to suppress, any argument on the legality of the search and seizure or any hint that the court was considering the issues raised here. The court of appeal seems to believe, however, that the record is complete (558 F.2d at 922). This is an erroneous view and petitioner would have further developed the facts of the arrest and seizure and his expectation of privacy, in the bag, if allowed to do so.

fact that the a closed paper bag is involved instead of a footlocker is immaterial. A person's expectations of privacy in closed-to-view movable personalty are not reduced by the size of the article: brief cases, tote bags, shopping bags, purses, handbags and closed paper bags are all common methods of carrying perscnal property in which the possessor has a privacy expectation.[4]

CONCLUSION

All the factors which are needed to bring Chadwick into play are present here:

1. A warrantless arrest;

2. Movable personalty which is closed to view as to its contents;

3. Movable personalty not carried on the person or physically held by the person;

4/ One of the smallest articles is an envelope containing paper. Closed, the envelope could contain a writing in which a high degree of privacy is expected (e.g., writings with 18 USC §§1461-1462) and which could not be opened or examined under Chadwick absent a search warrant.

4. Movable personalty reduced to the exclusive control of federal agents and seized and searched only after removal of the defendant from any area where he could gain access to it;

5. The absence of any exigent circumstances.[5]

Therefore, the petition for certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

November 3, 1977

5/ There was no need to examine the bag in order to detain petitioner. The defendant could be lawfully arrested and charged, without knowing whether the bag contained heroin, with 21 USC §846, attempt (based upon the conversations with the informant), 18 USC §924(c)(2), "carrying" the gun, and California Penal Code §§12025 and 12031.

UNITED STATES of America,
Appellee,

v.

Lewis Nathaniel DIXON, Appellant.

No. 76-2106.

United States Court of Appeals,
Ninth Circuit.

July 26, 1977.

Defendant was convicted before the United States District Court for the Northern District of California, Lloyd H. Burke, J., of possession of heroin with intent to distribute and carrying a firearm unlawfully during commission of a felony, and he appealed. The Court of Appeals, Kennedy, Circuit Judge, held that: (1) statute proscribing unlawful carrying of a firearm during commission of a felony was not designed only to increase punishment but was intended to establish a separate crime; (2) instructions as a whole stated that requisite elements for conviction of carrying firearm unlawfully would be satisfied only if act of carrying firearm was in and of itself unlawful, and (3) evidence that allegedly should have been suppressed was product of valid search incident to lawful arrest.

Affirmed.

1. Criminal Law ⇐29

Statute proscribing unlawful carrying of a firearm during commission of a felony was not designed only to increase punishment but was intended to establish a separate crime and thus defendant could properly be convicted of both possession of heroin with intent to distribute and carrying a firearm unlawfully during commission of a felony. 18 U.S.C.A. § 924(c)(2); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

2. Criminal Law ⇐822(6)

In prosecution for possession of heroin with intent to distribute and carrying a firearm unlawfully during commission of a felony, instructions, when considered as a whole, stated that requisite elements for conviction of carrying firearm unlawfully would be satisfied only if act of carrying firearm was in and of itself unlawful. 18 U.S.C.A. § 924(c)(2).

3. Criminal Law ⇐1038.2

Even under generous assumption that California statute permitting carrying a loaded firearm by person who reasonably believes that person or property of himself or another is in immediate danger could protect drug dealer who arms himself to insure successful completion of his nefarious activities, failure to so instruct did not constitute plain error in prosecution for possession of heroin with intent to distribute and carrying a firearm unlawfully during commission of a felony. 18 U.S.C.A. § 924(c)(2); West's Ann.Cal.Pen.Code, § 12031(j).

4. Arrest ⇐63.4(8)

Drug Enforcement Administration agents, who taped negotiations for narcotics transaction with defendant with informant's consent, who at agreed time and place observed defendant drive up to informant and stop, and who on prearranged signal from informant indicating that defendant had heroin in his possession placed defendant under arrest while still in his automobile, had reason to believe that informant was credible and that there was reliable basis for his conclusion that defendant was in possession of heroin, and thus had probable cause to arrest defendant.

Appendix A

5. Arrest ⇐71.1(5)

Where Drug Enforcement Administration agents had probable cause to arrest defendant, and one agent, after defendant was ordered to step out of automobile in which he was arrested, observed revolver and brown paper bag containing heroin on floorboard, brown paper bag and revolver were products of valid search incident to lawful arrest.

6. Arrest ⇐71.1(4)

Inspection of brown paper bag, which was observed and seized by Drug Enforcement Administration agents following defendant's arrest as he exited from automobile, was properly within scope of search incident to defendant's arrest.

7. Criminal Law ⇐1168(1)

While practice of consolidating suppression hearing with trial is not to be commended in all cases, where ample testimony, subject to cross-examination, was introduced at trial confirming that informant was reliable and that authorities had probable cause to arrest defendant, and both agents who conducted search incident to arrest and informant were examined thoroughly by defense counsel about circumstances surrounding arrest and search, defendant, who did not allege that he was prejudiced in any way by his failure to take stand on suppression issue, was not prejudiced by failure to hold separate hearing. Fed. Rules Crim.Proc. rule 12(e), 18 U.S.C.A.

Appeal from the United States District Court for the Northern District of California.

Before WATERMAN,* KENNEDY and ANDERSON, Circuit Judges.

OPINION

KENNEDY, Circuit Judge:

Lewis N. Dixon was convicted after a jury trial of one count of possession of heroin with intent to distribute, a violation of 21 U.S.C. § 841(a)(1), and of one count of carrying a firearm unlawfully during the commission of a felony, a violation of 18 U.S.C. § 924(c)(2). On appeal we consider the interpretation and effect of the firearms statute, the legality of a search and seizure, and the correctness of certain jury instructions.

[1] Appellant did not raise any objection to the jury instructions at trial, but nevertheless argues that the trial court committed plain error in allowing the jury to find the defendant guilty of violating 18 U.S.C. § 924(c)(2) as a separate offense. He argues that section 924(c)(2), which proscribes the unlawful carrying of a firearm during the commission of a felony, was not intended to create a separate federal crime, but was designed only to increase punishment. The argument advanced by appellant has been rejected by the several courts of appeals that have considered it. *United States v. Crew*, 538 F.2d 575 (4th Cir. 1976); *United States v. Williams*, 523 F.2d 1203, 1211 (5th Cir. 1975); *United States v. Howard*, 504 F.2d 1281 (8th Cir. 1974); *United States v. Ramirez*, 482 F.2d 807 (2d Cir. 1973); *United States v. Sudduth*, 457 F.2d 1198 (10th Cir. 1972). We find those authorities persuasive and rule that section 924(c)(2) was intended to establish a separate crime. Appellant could properly be convicted of violating both 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 924(c)(2).

* Honorable Sterry R. Waterman, United States Circuit Judge for the Second Circuit, sitting by designation.

[2] Appellant alsc contends that the trial court failed to instruct the jury fully and adequately that the defendant could not be convicted under 18 U.S.C. § 924(c)(2) unless he had been carrying a firearm unlawfully. *See United States v. Akers*, 542 F.2d 770, 772 (9th Cir. 1976). We find that the instructions were adequate and therefore reject this contention. Considered as a whole, the instructions did state that the requisite elements for conviction under the statute would be satisfied only if the act of carrying the firearm was in and of itself unlawful.[1]

[3] At oral argument before this court, counsel for appellant further urged that the district court committed reversible error by failing to charge the jury on its own motion that California law permits carrying a loaded firearm "by a person who reasonably believes that the person or property of himself or another is in immediate danger and that the carrying of such weapon is necessary for the preservation of such person or property." Cal.Penal Code § 12031(j) (West Supp.1977). Even under the generous assumption that section 12031(j) could protect a drug dealer who is armed to insure the successful completion of his nefarious activities, we cannot say that the failure to give such an instruction constituted plain error.

Appellant challenges on fourth amendment grounds the introduction at trial of both a pistol and a brown paper bag containing heroin. These items were seized from appellant's car at the time of his arrest. Viewed in the light most favorable to the Government, *United States v. Wilson*, 535 F.2d 521, 522 (9th Cir. 1976), the circumstances that led to

1. The relevant instructions were as follows:

> In connection with Count 2 of the indictment which charges the violation of Title 18, U.S. Code, Section 924(c)(2), the statute provides, in pertinent part, that:
>
> "Whoever carries a firearm unlawfully during the commission of a felony for which he may be prosecuted in a court of the United States shall be guilty of an offense against the laws of the United States."
>
> Two essential elements are required to be proved in order to establish the offense charged in Count 2 of the indictment.
>
> First, that the defendant committed a felony for which he may be prosecuted in a United States court; second, during the commission of that felony, the defendant carried a firearm.
>
> You are instructed that the crime of possession of heroin with intent to distribute, a violation of Title 21, U.S.C., Section 841(a)(1), is a felony for which the defendant may be prosecuted in a United States court.
>
> You are instructed that a Smith & Wesson 357 Magnum is a firearm within the meaning of Title 18, U.S.C., Section 924(c)(2).
>
> The defendant is considered to have carried the firearm if he conveyed, transported or took the firearm with him unlawfully during the commission of a Federal felony.
>
> It is unlawful to carry a loaded firearm within any vehicle which is under one's control or direction while on any public street in an incorporated city without having a license to carry such firearm.
>
> Though the instructions considered as a whole were adequate, it would have been preferable for the trial judge to have phrased the third paragraph of the quoted instructions in the following terms:
>
> First, that the defendant committed a felony for which he may be prosecuted in a United States court; second, that during the commission of that felony, the defendant carried a firearm unlawfully.
>
> The instructions to the jury in this case do not present the defects of those considered by this court in *United States v. Garcia*, 555 F.2d 708 (9th Cir. 1977). In that case, unlike here, the trial judge did not instruct the jury as to any statute or ordinance, federal, state, or city, from which it might make the factual determination that the defendant's carrying of a firearm was unlawful.

the arrest of appellant and the seizure of the evidence at issue are as follows: An informant advised the Drug Enforcement Administration (DEA) that he was about to negotiate a narcotics transaction with appellant. The ensuing negotiations were taped with the informant's consent. At the agreed time and place of the sale, DEA agents observed appellant drive up to the informant and stop. A license check confirmed that the car was appellant's. The informant walked over to the car, knelt down on the passenger side, and had a conversation with Dixon. On a prearranged signal from the informant to indicate that Dixon had heroin in his possession, the agents placed appellant under arrest while he was still in his car. Appellant was told three times to raise his hands. After hesitating suspiciously, he finally complied. He was ordered to step out of the car, and as he exited, one of the agents observed a revolver and a brown paper bag on the floorboard. While one agent patted him down for weapons and handcuffed him, another agent seized the fully loaded revolver and the brown bag. The second agent then opened the bag and discovered the contraband.

[4–6] There was ample probable cause to justify Dixon's arrest. The circumstances were more than sufficient to give the agents reason to believe that the informant was credible and that there was a reliable basis for his conclusion that appellant was in possession of heroin. *See McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); *cf. Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). The evidence that allegedly should have been suppressed was the product of a valid search incident to the lawful arrest. *See Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *United States v. Gonzales-Rodriguez*, 513 F.2d 928, 931 (9th Cir. 1975). There is no substance to appellant's claim that even if the seizure of the brown paper bag was valid, the Government should have obtained a warrant before investigating its contents. That inspection was properly within the scope of the search incident to Dixon's arrest. *United States v. Marshall*, 526 F.2d 1349, 1358 (9th Cir. 1975); *United States v. Murray*, 492 F.2d 178, 188 (9th Cir. 1973); *United States v. Mehciz*, 437 F.2d 145, 146–48 (9th Cir. 1971).

[7] Appellant also argues that the trial court committed reversible error by failing to conduct a separate hearing before trial on defendant's motion to suppress. Fed.R.Crim.P. 12(e). While the practice of consolidating the suppression hearing with the trial is not to be commended in all cases, *United States v. Ledesma*, 499 F.2d 36, 40 (9th Cir. 1974), the appellant here was not prejudiced by the failure to hold a separate hearing. *See id.* at 39–40; *Evalt v. United States*, 382 F.2d 424 (9th Cir. 1967). Ample testimony, subject to cross-examination, was introduced at trial confirming that the informant was reliable and that the authorities had probable cause to arrest Dixon. Both the DEA agents who conducted the search incident to appellant's arrest and the informant were examined thoroughly by defense counsel about the circumstances surrounding the arrest and the search. Moreover, appellant does not allege that he was prejudiced in any way by his failure to take the stand on the suppression issue. Under the circumstances, no reversible error occurred.

We have examined appellant's other contentions and find them without merit.

The judgment of conviction is AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 06 1977

EMIL E. MELFI, JR.
CLERK, US COURT OF APPEALS

UNITED STATES OF AMERICA,

Appellee,

v.

LEWIS NATHANIEL DIXON,

Appellant.

No. 76-2106

O R D E R

Appeal from the United States District Court
for the Northern District of California

Before: WATERMAN,* KENNEDY, and ANDERSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kennedy and Anderson have voted to reject the suggestion for a rehearing en banc, and Judge Waterman has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix B

*Honorable Sterry R. Waterman, United States Circuit Judge for the Second Circuit, sitting by designation.

No. 77-652

In the Supreme Court of the United States

OCTOBER TERM, 1977

LEWIS NATHANIEL DIXON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-652

LEWIS NATHANIEL DIXON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the warrantless search of a paper bag containing heroin that was recovered from his car at the time of his probable cause arrest violated the Fourth Amendment.

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and of carrying a firearm unlawfully during the commission of a felony, in violation of 18 U.S.C. 924(c)(2). He was sentenced to consecutive terms of 15 and ten years' imprisonment, to be followed by a special ten-year parole term, and was fined $25,000. The court of appeals affirmed (Pet. App. A; 558 F. 2d 919).

1. The evidence at trial showed that on September 18, 1975, petitioner agreed to sell a pound of heroin for $12,000 to Willie Hudson, an informant who had previously purchased heroin from petitioner (Tr. 80, 83, 88, 96-98, 116, 117, 179-180, 183). With Hudson's consent, agents of the Drug Enforcement Administration recorded his oral agreement with petitioner (Tr. 84-85). Thereafter, Hudson and petitioner arranged in a recorded telephone conversation to meet later that afternoon at a specified location to consummate the heroin deal (Tr. 117, 121-125, 191). D.E.A. Agents Robert Michelotti and William Ruzzamenti instructed Hudson to meet with petitioner as planned and to signal them if petitioner had the heroin in his possession (Tr. 126, 192-193).

Hudson drove to the rendezvous with petitioner under the surveillance of Agents Michelotti and Ruzzamenti, who parked about one-half block away (Tr. 194). When petitioner arrived a few minutes later, Hudson knelt down on the sidewalk outside the open window of petitioner's car and engaged him in conversation, during which Hudson noticed a brown paper bag containing heroin inside the car (Tr. 131, 194-195). At this point, Hudson gave the prearranged signal to the surveilling agents; they immediately moved in and arrested petitioner while he was still sitting behind the wheel of his car (Tr. 237). Agent Michelotti ordered petitioner to get out of the car. As petitioner did so, the agent noticed a gun and brown paper bag on the floorboard on the driver's side of the front seat (Tr. 237-242). As soon as petitioner had been frisked for weapons and handcuffed, Agent Ruzzamenti seized the loaded gun and the bag, which contained heroin (Tr. 205-207).

2. Although petitioner concedes (Pet. 4) that there was probable cause for his arrest, he argues (Pet. 5-10) that the agents' warrantless search of the paper bag and seizure of the narcotics was contrary to this Court's ruling in *United States* v. *Chadwick*, No. 75-1721, decided June 21, 1977. *Chadwick*, however, involved a warrantless, probable cause search of a double-locked footlocker, conducted at the offices of the Drug Enforcement Administration an hour and a half after the defendants had been arrested elsewhere for possession of contraband. *Chadwick* involved neither the "automobile exception" to the warrant requirement *(Carroll* v. *United States,* 267 U.S. 132) nor the existence of any exigent circumstances at the time of the search. *United States* v. *Chadwick*, *supra,* slip op. 2, 10. Moreover, the search in *Chadwick* was not incident to defendants' arrest because it "was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody." *Id.* at 13.

Here, unlike the situation in *Chadwick,* the paper bag containing heroin was recovered from petitioner's automobile and inspected at the scene of his arrest (a "dead end street" in a "very low income" area (Tr. 193, 195)), just after petitioner had been removed from the car, frisked and handcuffed, and at a time when there were five to ten people in the area, including a known heroin addict, who apparently were aware that the situation involved drugs (Tr. 127, 129, 176, 191-195). The need for an immediate search was further heightened by the fact that a gun was lying on the floor of the car next to the paper bag. This was, in short, a situation in which "the person arrested may seek to use a weapon, or * * * evidence may be concealed or destroyed." *United States* v. *Chadwick, supra,* slip op. 12. See *Chimel* v. *California,* 395 U.S. 752, 763. Therefore, as the court below held (Pet. App. A), the search and seizure were lawful as incident to petitioner's arrest.

Alternatively, the warrantless search of the paper bag taken from petitioner's car was within the automobile search doctrine. See *United States* v. *Chadwick*, *supra*, slip op. 10-11; *Texas* v. *White*, 423 U.S. 67, 68; *Chambers* v. *Maroney*, 399 U.S. 42, 48; *United States* v. *Soriano*, 497 F. 2d 147 (C.A. 5) (*en banc*), certiorari denied *sub nom. Aviles* v. *United States*, No. 76-5132, June 27, 1977.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

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[1]Since the agents had probable cause to believe that the automobile had been used to transport narcotics, it could also have been seized for forfeiture (21 U.S.C. 881(a), 881(b)) and searched without a warrant under *Cooper* v. *California*, 386 U S. 58.

No. 77-652

IN THE SUPREME COURT OF THE UNITED STATES

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LEWIS NATHANIEL DIXON, Petitioner

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
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PETITIONER'S REPLY MEMORANDUM

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITIONER'S REPLY MEMORANDUM

The Memorandum of the United States in Opposition attempts to distinguish petitioner's case from application of United States v. Chadwick, No. 75-1721, decided June 21, 1977, on three theories:

1) The government contends that the Chadwick search was remote in time and place from the arrest (M.O. 3); the Dixon search was not. This ignores the fact

that the Chadwick "seizure" was incident to an arrest and that this Court specifically declined to limit its ruling in Chadwick to only those cases where the object seized "incident to" was searched at a remote time and place. However, in Dixon, the arresting agent testified he could not and did not see what was in the paper bag seized at the time of the arrest (RT 242). The agent who then took custody of the bag (RT 221) did not testify to examining the bag at the scene. The record appears to support the inference that the bag may not have been examined until the agents reached their offices in San Francisco (RT 205).[1]

1/ The unfortunate state of the record as to such detail exists because a noticed pretrial motion to suppress was never heard pre-trial and no one at trial sought to examine or cross-examine on the details of who looked at or into the bag when the heroin, concealed inside the bag, was examined.

There is nothing in the record to support a finding that the bag was searched at the scene. It is likely it was not. The conversations by Dixon with informant Hudson, overheard on the body recorder by agents, led toward this meeting only for the purpose of a delivery of heroin by Dixon to Hudson. Hudson told the agents Dixon had the heroin in the car and the overheard conversation at the car corroborated this. Thus, a "field test" or examination of the powder might not have been conducted at the scene. If, as the government contends, the locale of the arrest and presence of others, including a "known heroin addict" (M.O. 3) presented any risks, the examination of the bag could well have been delayed to a time and a place more convenient to agents. The situation would then be on all fours with Chadwick.

2) The government contends that Chadwick presented no facts where "The person arrested may seek to use a weapon or . . . evidence may be concealed or destroyed." United States v. Chadwick, supra, Slip Op. 12 (M.O. 3); while Dixon, does present such facts. This is not correct: Petitioner, who arrived alone in his auto, was arrested at a pre-arranged combined DEA/local law enforcement "stake out". As the government notes, there were many people present, but many were law enforcement officers. The "known heroin addict" referred to by the government (M.O. 3) was apparently either the cooperating DEA informant Willie Hudson, who arranged for the sale on behalf of the government and gave the signal for agents to move in and arrest Dixon (RT 78, 84-85, 90-112, 118-131), or some people inside a house well removed from the arrest area at the critical time (RT 126-

129). The "body recorder" worn by Hudson transmitted a conversation he had with some other people on the street prior to the arrest (RT 127); however, a gap in time occurred until he gave the signal to DEA agents to move in and there is no evidence that any people besides agents, Dixon and Hudson were on the street near the Dixon vehicle at the point of arrest[2] (RT 127-130).

By the time anyone saw the package (later found to contain heroin) inside the car, Dixon had been removed totally away from the area of the driver/

2/ Hudson was, at the time of arrest, across the street away from Dixon (RT 174), having moved to his own car to raise the hood (the signal for agents to move in and arrest Dixon) and to be placed under "simulated arrest" (RT 130-131). Dixon's vehicle was on a dead-end street (RT 194) so that flight was difficult. The observation of the agent that five to ten people were walking in the general vicinity (RT 195) [apparently one or two were children (RT 220)] was followed by a three to five-minute period before Hudson gave any signal (RT 196).

passenger compartment, frisked and handcuffed. He was totally unable to use a weapon or to take any action to conceal or destroy evidence. Chimel is thus inapplicable.[3]

3) The government contends that the warrantless search was an automobile search or forfeiture search. The theory of forfeiture (of both containers and the auto) was advanced by the government in Chadwick and was based upon the same statutory provisions noted in the Memorandum in Opposition here, p. 4 (Brief for the United States in Chadwick, 48-49).

3/ The then-Solicitor General in Chadwick conceded that Chimel was limited to areas where the defendant had actual immediate control (Brief for the United States, 50-51). Dixon is no different than Chadwick in this respect.

The theory of the automobile search doctrine was put forth in Chadwick with vigor (Brief for the United States, 12, 13, 35, 36, 38, 39, 43, 55). Neither was accepted by this Court.

Respectfully submitted,

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